NO. 47945-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

Ronald Mullins

Appellant,

v.

Michael Malone and Jane Doe Malone,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR GRAYS HARBOR COUNTY

RESPONDENTS' BRIEF

LAW OFFICES OF SWEENEY, HEIT & DIETZLER
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I. INTRODUCTION

Plaintiff/Appellant Ronald A. Mullins (herein after "Mullins") claims injuries as a result of a motor vehicle accident. Mullins filed suit seven days before the expiration of the three (3) year statute of limitations, but failed to serve the named defendant/respondent Michael W. Malone (hereinafter "Malone") with the summons and complaint. Another ninety (90) days elapsed after the expiration of the statute of limitations, but Mullins failed to serve Malone with the summons and complaint. Malone moved for summary judgment on the basis that Mullins failed to serve the summons and complaint within the statutory prescribed period. The trial court, after reviewing the briefings of the parties, and hearing oral argument, granted summary judgment in favor of Malone on the grounds that Mullins waited until seven (7) days before filing the summons and complaint; failed to serve Malone within the three (3) year statute of limitations period; and failed to serve Malone within ninety (90) days with the summons and complaint. Mullins appeals the trial court's ruling.

II. ISSUES FOR ASSIGNMENT OF ERROR

A. Summary Judgment was proper when the Trial Court properly exercised its discretion when it granted Malone's motion for summary judgment because (1) Mullins waited to file his complaint until seven days before statute of limitations had lapsed, (2) Mullins did not serve

Malone within the three year statute of limitations, and (3) Mullins did not serve. Malone within ninety (90) days of filing the summons and complaint pursuant to RCW 4.16.170.

B. Malone never waived his affirmative defense of insufficiency of service of process when appellant alleges he did not answer the *complaint* within twenty (20) days of actual notice.

C. Whether actual notice of the lawsuit within the statutory period is sufficient to perfect service, when appellant alleges that Mr. Malone's counsel, while engaging in procedural and substantive legal discussions with Mr. Mullins' counsel regarding the *complaint.*

D. Whether the Trial Court properly barred Mr. Mullins from amending the *complaint,* as they are alleging, when at no time did Mr. Mullins move to amend the complaint.

III. STATEMENT OF THE CASE

This matter arises from a motor vehicle accident that occurred on March 5, 2012 in Aberdeen, WA. Plaintiff alleges he suffered injuries when his vehicle was struck by a vehicle driven by Michael Malone. CP. 000091-000093.

On February 26, 2015, just seven days before the statute of limitations expired, Plaintiff filed his complaint against Michael Malone. *Id.* On March 5, 2015, the statute of limitations expired. On June 3, 2015,

ninety days elapsed from the statute of limitations.

IV. SUMMARY OF ARGUMENT

A. Standard of Review

The Trial Court did not abuse its discretion when it granted Malone's motion for summary judgment. A trial court's decision granting a motion for summary judgment is reviewed for an abuse of discretion. *Wilson v. Horsely*, 137 Wn.2d 500, 505, 974 P.2d 316 (1999); *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 93 Wn. App. 819, 837-38, 70 P.2d 803 (Div. 1 1999). A trial court's decision regarding a motion granting summary judgment will not be "disturbed on appeal except for a manifest abuse of discretion or a failure to exercise discretion." *Del Guzzi Constr. Co., Inc. v. Global Northwest LTD., Inc.*, 105 Wn.2d 878, 888, 719 P.2d 120 (1986)(trial court's denial of a motion to amendment made one week before a motion for summary judgment hearing was not a manifest abuse of discretion or failure to exercise discretion.).

The trial court properly granted summary judgment dismissal because there were no material facts at issue regarding Mullins non service of the summons and complaint falling outside the statute of limitations. In reviewing an order of summary judgment, the appellate court engages in the same inquiry as the trial court; summary judgment will be affirmed where there are no genuine issues of material fact and the

moving party is entitled to judgment as a matter of law. *Hertog v. City of Seattle*, 138 Wn.2d 265, 275, 979 P.2d 400 (1999).

Further, pursuant to CR 56, when the pleadings, affidavits, declarations, and documentary evidence on file demonstrate that there is no genuine issue of material fact, then the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). "Proper service of a summons and complaint is a prerequisite to the court obtaining jurisdiction over a party." *Woodruff v. Spence*, 76 Wn.App. 207, 209, 883 P.2d 936 (1994). "Whether service of process [is] proper is a question of law..." *Goettemoeller v. Twist*, 161 Wn.App. 103, 108, 253 P.3d 405 (2011).

B. Mullins Failed to Timely Serve Malone.

Service of process must comply with statutory requirement to be valid. *Thayer v. Edmonds*, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972). Again, in Washington State service is to be made pursuant to RCW 4.28.080. The relevant portions of RCW 4.28.080 states:

> (16) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person suitable age and discretion then resident therein. RCW 4.28.080.

Thus to be valid, a plaintiff must have either (1) served the

defendant with a copy of the summons and complaint in person; (2) served defendant by leaving a coy of the summons at the defendant's house or his usual abode with someone of suitable age and discretion who is also a resident of the home; or (3) when a person cannot with responsible diligence be served under the first two options, serve the defendant by leaving a copy of the summons and complaint at the defendant's usual mailing address with a person of suitable age and who is a resident of the home and then also mail a copy by certified mail to the same address. *Id.*

Of the available alternatives, there is no dispute that Mullins did not serve the summons and complaint on Malone at any time.

Moreover, Mullins did not use reasonable diligence to serve Malone, or in fact, take any steps whatsoever to perfect service. "Reasonable diligence requires the plaintiff to make honest and reasonable efforts to locate the defendant." *Wright v. B & L Properties, Inc.*, 113 Wn.App. 450, 458, 53 P.3d 1041 (2002). In *Wright*, the Court found that the reasonable diligence requirement had been met when the plaintiff called the local phone company's directory assistance to locate the defendant's address, they made inquires at the office of the Secretary of State (defendant was a general contractor) and the Department of Labor and Industries, and they searched social security voter's registration, traffic records, and criminal records to no avail before

attempting service at the defendant's usual mailing address. *Id.*

On the contrary, Mullins made no effort whatsoever to either identify and/or use reasonable efforts to perfect service. Mullins never called the local phone company's directory assistance to locate the Malone's address; never made inquires at the office of the Secretary of State and the Department of Labor and Industries; never searched social security voter's registration, traffic records, and criminal records to no avail before attempting service at Malone's usual mailing address.

C. Malone Never Waived Any Affirmative Defenses

Mullins further alleges that Malone formally appeared in this matter via counsel, and that the Notice of Appearance did not reserve the defense of improper or sufficient service, and that the Complaint was never answered therefore no affirmative defenses were preserved. (See Appellant Brief at 7). However, other than mere allegations, Mullins has stated no facts supporting his position and/or provided any evidence that a Notice of Appearance must set forth each and every potential or applicable affirmative defense lest it be waived. This is simply not Washington law.

Mullins refers to Civil Rule 12, but never correctly cites the applicable rule. Civil Rule 12(h)(1) indicates:

> A defense of lack of jurisdiction over the person, improper

> venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule not included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

To be clear, Malone never filed a responsive pleading. Malone filed a Notice of Appearance identifying that defendant Malone was represented by counsel. There is no requirement under the Civil Rules, RCWs or Washington case law that a mere Notice of Appearance (which does not in any manner address any allegations or issues raised in the Complaint) must set forth each and every affirmative defense at the vey onset of litigation before any responsive pleading is ever filed. Such an argument lacks common sense. A responding party has 20 days to file an answer; should a defendant receive the complaint and the next day respond with a Notice of Appearance, its plaintiff's position that this should take the place of an answer and include affirmative defenses. This is not Washington law and should be disregarded accordingly.

With regard to the contents of the Notice of Appearance, and whether it preserved an affirmative defense of insufficient service of process, Mullins argument is quickly dismissed under the case of *Lybbert v. Grant County,* 141Wn.2d 29, 39, 1 P.3d 1124 (2000). As stated in *Lybbert:*

> It is also of no significance to our waiver analysis that the notice of appearance, filed by one of the attorneys for the County, included a statement that counsel was appearing "without waiving objections to improper service or jurisdiction." CP at 13. That is so because we have said that the mere appearance by a defendant does not preclude the defendant from challenging the sufficiency of service of process. Thus, even if the caveat had not been included, the County could have challenged the sufficiency of the service of process. In other words, it was not necessary for the County to indicate that it was appearing "without waiving objections to improper service" in order to subsequently challenge the service of process. Since the filing of a notice of appearance without including the caveat cannot constitute a waiver of the defense, we see no reason why filing the notice of appearance with the caveat should serve as a vehicle to preserve it. *Id.* at 1131-32.

Mullins further relied on *Lybbert v. Grant County,* for his position on waiver by the conduct of Malone. This case is easily distinguishable. In *Lybbert*, the Court considered whether the defendant waived the defense of insufficient service of process with a defendant participating in discovery and failing to assert the defense prior to the expiration of the statute of limitations. The Court reasoned that the defendants' discovery efforts were inconsistent with the later asserted defense because it was not geared toward elucidating facts relating to a defense of insufficient service of process. *Id.* at 1131.

Moreover, the Court found that the County did more than just undertake discovery. A detective contacted Lybberts' counsel in order to make certain that the County correctly understood the nature and extent of

the Lybberts' interrogatories. Furthermore, there were telephone calls between counsel for the respective parties at which there was a discussion about potential mediation. Of particular significance is the fact that the Lybberts served the County with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process. Had the County timely responded to these interrogatories, the Lybberts would have had several days to cure the defective service. The County did not answer the interrogatories but instead waited until after the statute of limitations expired to file its answer and for the first time assert the defense. *Id.*

Here, plaintiff never served any discovery. The first contact initiated by Malone was April 23, 2015 (after the statute of limitations expired). There were no telephone calls about mediation. There was a single email about whether Mullins was ever going to send out a demand. As Mullins failed to do so, no settlement discussions ever took place. As the trial court found, there was simply no conduct, action or anything done by Mullins to pursue this case and properly effect service. Mullins did nothing. In turn, Malone did nothing, and had no obligation to otherwise proceed with the underlying motion to dismiss.

To further support Malone's stance that there was improper service, Mullins in his own Response, stated that "Plaintiff received

correspondence from Defendant's counsel stating that it was his belief that service had never been perfected on his "clients (Malone or Todd Robinson Painting)." CP 000078. Mullins at no point conducted proper service on Malone and has provided no evidence supporting the allegation that counsel for both Mullins and Malone engaged in substantive correspondences pertaining to a settlement. Here, there was an initial exchange of emails with a question posed whether a settlement demand (not settlement negotiations) has been sent. CP 000057. There was never any settlement discussion as claimed by plaintiff; nor was there ever a settlement demand ever sent by Mullins. By definition, without a demand, there can be no discussions. Mullins chose not to negotiate.

Clearly, Mullins' complaint is time barred by the statute of limitations. Under RCW 4.16.080, actions for personal injury must be commenced within three years of the injury. Mullins injury arose from an alleged accident on March 5, 2012. Thus, pursuant to the statute, an action for said injury should have commenced on or before March 5, 2015. On February 26, 2015, just seven days before the statute of limitations, Mr. Mullins filed his Complaint against Mr. Malone. CP 000091. Thereafter, Mr. Mullins failed to perfect service on Mr. Malone before the lapse of the ninety day statute of limitations. CP 000082-

000086.

RCW 4.16.170, states:

> For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever comes first. If the service has not had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If the following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 4.16.170. Thus, whether the service is effected first or the complaint is filed first, the other needs to be filed or effected within 90 days to commence the action and toll the statute of limitations. *Id. see also, Banzeruk v. Estate of Howitz ex rel. Moody*, 132 Wn.App. 942, 135 P.3d 403 (2006). As explicitly stated, if not done within ninety days, "the action shall be deemed to not have been commenced for purpose of tolling the statute of limitations." RCW 4.16.170.

As previously stated, Mullins never served the summons and complaint on Malone within the statute of limitations. Further, Mullins did not perfect service within the ninety days after filing the complaint. Mullins has repeatedly stated that counsel for Malone has lured Mullins

into believing that there were no outstanding technical issues to be addressed, not bound to raise affirmative defense in informal communications with Mullins, and engaged in substantive correspondences pertaining to the case. *See* CP 000057 and 000078. However, this is the extent of the very limited conversations. First, an introduction email between counsel on April 23, 2015 (which is already well beyond the expiration of the statute of limitations); and, second, a follow up email on June 16, 2015 when Mullins failed to timely serve the summons and complaint. *Id.* Mullins representations to this Court that there was gamesmanship or anything contrary to the highest standards of ethical conduct is completely without merit. Any further comment on these dispersions is unnecessary.

"Washington courts have consistently held that strict compliance with the requirements of notice and claim statutes is a condition precedent to recovery." *Hardesty v. Stenchever*, 82 Wn.App. 253, 259, 917 P.2d 577 (1996). "The proper remedy for a plaintiff's failure to comply with the statute is dismissal of a suit." *Id.* Mr. Mullins actions in the present case clearly demonstrate that he failed to timely file and serve the instant summons and complaint within the applicable statute of limitations. The Trial Court properly granted Malone's Motion for Summary Judgment.

Lastly, this Court should not consider any argument not properly raised at the trial court level. Mullins never filed or made any request to the trial court for an amendment. Mullins raised the possibility of amending the complaint, but never moved the court for an actual amendment to the complaint. This Court should not consider any arguments regarding Mullins potential to file an amendment as Mullins sat on this case for 6 months after filing in February 2015, and never made any attempt to amend the complaint.

V. CONCLUSION

For all the reasons stated herein, Mr. Malone respectfully requests that this Court affirm the Trial Court's ruling granting its Motion for Summary Judgment Dismissal. In addition, pursuant to RAP 14.2, Mr. Malone seeks an award of costs for this appeal.

DATED this 11th day of February, 2016.

LAW OFFICES OF SWEENEY, HEIT & DIETZLER

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Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY under penalty of perjury that on the 12th day of February, 2016, I sent for delivery a true and correct copy of the foregoing **BRIEF OF APPELLANT** by the method indicated below, and addressed to the following:

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